No. 87-399

In The
Supreme Court of the United States
October Term, 1987

SUPREME COURT OF VIRGINIA, and its Clerk, DAVID B. BEACH,

Appellants,

v.

MYRNA E. FRIEDMAN,

Appellee.

On Appeal From the United States Court of Appeals for the Fourth Circuit

APPELLANTS' REPLY BRIEF

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Appellants, the Supreme Court of Virginia and its Clerk, David B. Beach, submit this reply brief to address the Commerce Clause and Equal Protection claims made by the appellee, Myrna E. Friedman, which were not addressed by the court of appeals or in appellants' opening brief.

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ARGUMENT

I. Virginia's Residence Requirement For Admission Without Examination Does Not Violate The Commerce Clause Because There Is No Basis For Concluding That The Requirement Imposes An Unreasonable Burden On Interstate Commerce.

Article I, Section 8 of the Constitution limits the power of a State to create unreasonable barriers against interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979). As with the Privilege and Immunities Clause, this limitation on the exercise of power by a State to regulate matters of "legitimate local concern" is not absolute, even though interstate commerce may be affected by such regulation. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980).

Furthermore, although this Court has recognized that certain aspects of the practice of law constitute "commerce" or "commercial activity," *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 778 (1975), the Court has also confirmed that there are non-commercial aspects of the practice of law which distinguish it from purely commercial activity, and indeed has stated that the practice of law should not be viewed "as interchangeable with other business activities." *Goldfarb*, 421 U.S. at 778 n. 17. More importantly, this Court in *Goldfarb* made clear that nothing in its decision limited "the authority of a state to regulate its professions," noting that the "[i]nterest of the State in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice." *Id.* at 792-93. The Court reiterated this principle in *Bates v. State Bar of Arizona*,

433 U.S. 350, 361 (1977): "The regulation of the bar is at the core of the State's power to protect the public." Thus, for purposes of Commerce Clause analysis, a State court's regulation of admissions to a State's bar is unquestionably a matter of legitimate local concern.

This Court has articulated two tests for examining the validity of a State law challenged as violating the Commerce Clause. First, under the "outright protectionism" test, "[t]he Court has observed that 'where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.'" *Lewis v. BT Investment Managers, Inc., supra*, at 36, *quoting from City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978). "A court may find that a state law constitutes 'economic protectionism' on proof either of discriminatory effect, or of discriminatory purpose." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n. 15 (1981).

This Court's decisions also have made clear, however, that a state law is not discriminatory although it affects articles of commerce so long as "there is some reason, *apart from their origin*, to treat them differently. *Lewis v. BT Investment Managers, Inc., supra*, at 36; *City of Philadelphia v. New Jersey, supra*, at 626-27 (1978) (emphasis added). In this case, it is apparent that the residence requirement for admission without examination is not directed to any particular attorney because he or she is from out of state, and there is not one fragment of evidence in the record to suggest such an intention. Rather, the stated purpose of Virginia's bar admission regulatory framework is to ensure that Virginia clients are

served by knowledgeable lawyers who are committed to serving Virginia clients and improving the legal system in Virginia. An experienced attorney seeking admission to the Virginia bar may satisfy this required showing of competence and commitment in one of two ways. The applicant may take and pass the Virginia bar examination, which serves as an immediate or *short term* demonstration of the applicant's intention or commitment to maintain a substantial practice and serve the administration of justice in the state, and also establishes by an objective measure the applicant's knowledge and competence in Virginia law and procedure. In lieu of the bar examination, an attorney applicant may make the required showing of competence and commitment through the *long term* process defined by Rule 1A:1, i.e., by residing and practicing full time in the State. Residence confirms the applicant's commitment to, or personal investment in, the Virginia legal system, and facilitates adherence to the full time practice restriction, all of which ensures the applicant's frequent exposure to Virginia law and practice. Thus, the residency component of the rule is addressed only to those attorneys who choose not to demonstrate otherwise, i.e., by taking and passing the bar examination, a commitment of service to the bar of Virginia, and the assurance that they will become proficient in Virginia law and practice. It is for this reason, and not because of their origin, that the rule implicates nonresident attorneys. Accordingly, there is no purposeful discrimination, and no *per se* violation as a matter of law.

Appellee also argues in her brief that the "'practical operation' of the residence requirement is to exclude out-of-state attorneys from the Virginia bar . . ."

(p. 39). This is simply not true. There is nothing to prevent the appellee from maintaining her residence in Maryland while practicing freely in the courts of Virginia. She has an alternative available to her which will permit her to achieve that result, and that is simply taking and passing the bar examination. There were no similar alternatives available to the complainants in the Commerce Clause cases cited in appellee's brief. Thus, in *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), the "primary manufacture within Alaska" requirement was an absolute prerequisite to the purchase of low priced Alaskan timber. Absent compliance with the in-state processing requirement, the complainant was prohibited from purchasing the low priced Alaskan wood. There is no such absolute bar in this case. Simiarly, in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), Arizona law required all Arizona cantaloupes to be packed at a plant in that State. Absent compliance, the complainant was prohibited from shipping them beyond state lines. There is no such absolute prohibition in this case.[1]

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[1] *See also City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (absolute prohibition on importation of solid or liquid wastes into New Jersey with no alternatives to accomplish the same result); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977) (North Carolina law permitted importation of apples only if containers bore USDA grading system; effectively barred Washington state apples which bore that state's grading system); *Great Atlantic and Pacific Tea Company v. Cottrell*, 424 U.S. 366 (1976) (Mississippi law absolutely prohibited importation of milk from other states unless those states accepted Mississippi milk on a reciprocal basis); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (local ordinance absolutely prohibited sale of milk not pasteurized and bottled within five miles of town).

Indeed, i. the Court were to hold that the rule is *per se* invalid simply because it affects out-of-state attorneys, then no *reciprocal* admission requirement (which necessarily applies only to foreign attorneys) could ever survive analysis under the Commerce Clause. The "practical effect" of such a result would be either the ordination of a national bar, or more likely, the requirement of a bar examination for all. Clearly, the Commerce Clause requires neither result.

Appellee also contends that residence for admission without examination violates the second, less stringent test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under this test:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree, and the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

Lewis, supra, at 36-37, *quoting from Pike v. Bruce Church, Inc., supra* at 142. Applying this standard to the case at bar, it is clear that Virginia's bar admission program operates in an evenhanded manner to effectuate a legitimate, if not compelling, local interest. The record in this case establishes that 91% of all Virginia residents who seek admission to the Virginia bar must take the Virginia bar examination (J.A. 54, 55). This number includes not

only recent law school graduates, but also experienced attorneys who have less than five years practice in another state; experienced attorneys with more than five years of practice but who come from states which do not provide for reciprocal admissions; and experienced attorneys who are not willing to comply with the full time practice requirement. Thus, most resident bar applicants, like nonresident bar applicants, must take and pass the Virginia bar examination in order to gain admission. The examination is waived only for the small number of experienced attorney applicants who are willing to comply with Virginia's "long term" process for demonstrating a commitment to the bar and competence in local law, i.e., by residing and practicing full time in the State. Clearly, any burden on interstate commerce occasioned by Virginia's reciprocity admission requirements must be regarded as incidental, especially when balanced against the importance of the State interests involved, and when viewed in conjunction with the "short term" process of admission by examination.

For similar reasons, appellee's "unconstitutional condition" argument also is fatally flawed. The availability of the bar examination is the factor which distinguishes this case from *South-Central Timber Development, Inc. v. Wunnicke, supra*, cited in appellee's brief in support of her unconstitutional condition contention. The ultimate *benefit* sought to be attained in this case is the opportunity to practice law as a member of the Virginia bar, whereas in *Wunnicke*, the ultimate benefit sought was the opportunity to purchase low price Alaskan timber. Here, the out-of-state applicant may attain the benefit of Vir-

ginia bar membership by taking and passing examination. In *Wunnicke*, there was *no means* by which the out-of-state processor could attain the benefit of purchasing low priced timber. The in-state processing requirement was an "unconstitutional condition" in that it was an insurmountable barrier to the enjoyment of the benefit. There is no such insurmountable barrier in this case which prevents the appellee from practicing law in Virginia. And while Alaska may have been free to shut down its timber business and sell to no one, Virginia cannot dismantle its state bar and decree an end to the practice of law in the Commonwealth.

Appellee's unconstitutional condition example illustrates the fallacy of her attempt to color match the facts of this case to the reasoning of Commerce Clause cases involving packing cantaloupes, shipping apples and cutting timber. Her attempt to isolate and view in a vacuum one aspect of Virginia's reciprocity admission policy without regard to the Commonwealth's bar admission program as a whole is misleading. The express purpose of Virginia's rule allowing admission without examination, in addition to ensuring competence and a commitment in fact among untested attorneys, is "to promote interstate mobility among providers of professional legal services." (J.A. 25). While the bar examination is a condition for admission to the bar imposed on residents and nonresidents alike, the waiver of the bar examination for a limited class of practitioners actually makes it easier for lawyers to change states. Thus, far from placing an unreasonable burden on the interstate mobility of lawyers, the Virginia bar admission program actually enhances that mobility.

The real thrust of appellee's arguments, and that of amici who have filed in favor of appellee's position, is that States should be denied the authority to place *any* restrictions or conditions upon admission without examination. They argue for a constitutionally mandated national bar, whereby admission to one State's bar is admission to all. Residence for admission in lieu of examination is attacked in this case today, and appellee has made clear that full time practice will be challenged again. The requirement of *reciprocity* among the remaining reciprocal states surely will be litigated, and the five years of active practice requirement may be attacked next as arbitrary and unnecessary. The prospect of such litigation challenging the States' tools for regulating the quality of their bars is the principal cause for the large number of States which have abandoned reciprocity altogether, and the number of States abolishing reciprocity continues to increase, even as this case proceeds to argument.[2]

Appellee argues that no consideration should be given by this Court to the likelihood that even more States will abandon reciprocity admissions if conditions on reciprocal admissions are ruled unconstitutional. This argument ignores the unfolding facts and runs contrary to the purpose of the Constitutional provisions governing relations among the several States. Appellants submit that the decline of

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[2]On December 18, 1987, the Wyoming Supreme Court entered an order, effective March 15, 1988, amending Rule 5 of the Rules of the Supreme Court of Wyoming, eliminating admission to the Wyoming bar without examination. After the effective date, all applicants will be required to take the regular Wyoming bar examination. Twenty-nine states now provide no form of reciprocity admission.

interstate mobility through the elimination of bar admission by reciprocity is a development which the Commerce Clause, and indeed the Privileges and Immunities Clause, should be construed to protect against. In any event, the States and the lower federal courts are in need of guidance regarding the appropriate Constitutional limitations and standards governing the States' power to establish conditions for discretionary admission to the bar. The better approach would encourage rather than inhibit reciprocity procedures. Appellants submit this Court should announce a general principle that admission without examination requirements are valid so long as they do not tread upon fundamental rights or invidiously discriminate upon some suspect criterion. Commerce Clause or Privileges and Immunities considerations have no connection to discretionary admission without examination. Those interests are satisfied by the right of all persons, within and without the State, to gain admission to a State's bar by passing its bar examination.

For all these reasons, appellants submit that Rule 1A:1(c) of the Rules of the Supreme Court of Virginia does not violate the Commerce Clause.

II. Virginia's Residence Requirement For Admission Without Examination Does Not Violate The Equal Protection Clause Because It Is Rationally Related To Virginia's Legitimate Interest In Maintaining A Knowledgeable Bar Which Is Committed To Serving And Improving The Legal System In Virginia.

Appellee's equal protection argument has already been litigated and put to rest in *Brown v. Supreme Court*

of Virginia, 414 U.S. 1034 (1973) *summarily aff'g*, 359 F.Supp. 549 (E.D. Va.). Contrary to the assertions in appellee's brief (p. 38), *Brown* was not solely a "right to travel" case. In considering a nonresident's challenge to Rule 1A:1(c) there, the court concluded that Virginia acted "rationally and with a compelling state interest" in requiring an attorney seeking admission without examination "to reside permanently in Virginia and devote his full time to the practice of law therein." *Brown*, *supra*, 359 F. Supp. at 561, *aff'd mem.*, 414 U.S. 1034 (1973). This issue also was addressed by the United States Court of Appeals for the Seventh Circuit in *Sestric v. Clark*, 755 F.2d 655 (7th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986), which stated "we do not think that the equal protection clause ordains in effect a national bar, whereby admission to one state's bar is admission to every other's." *Sestric*, *supra*, 765 F.2d at 663.

Appellee's reliance on recent tax cases to support her argument that Rule 1A:1(c) violates Equal Protection is likewise without merit. Those cases examined the results achieved by a State's classification to determine if they were related to the State's proffered objectives, and in all cases found that a rational relationship or a legitimate State interest did not exist. Thus, in *Williams v. Vermont*, 472 U.S. 14 (1985), this Court struck down a use tax exemption which excluded, and therefore imposed a tax burden, solely on new residents. The Court found that the State's rationale for the use tax (i.e., to reach out-of-state purchases by Vermont residents) had no application to purchases made by persons who were not residents of Vermont at the time they made the purchase. Likewise, in

Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985), the Court struck down a New Mexico tax exemption provided for Vietnam Veterans, but only if they had lived in the state before 1976. The Court found that the legislative classification bore no rational relationship to one of the State's objectives—to encourage Vietnam Veterans to move to New Mexico. And in *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) the Court struck down Alabama's "domestic preference" tax which had, as its express legislative purpose, to promote domestic business over foreign competitors. This was not, the Court concluded, a legitimate State interest.

It is clear that the reasoning of these cases has no application to the case at bar. There is not one fragment of evidence in this case, or in the whole history of the Virginia Supreme Court's regulation of the practice of law in Virginia, which provides even the remotest inference that Virginia's reciprocity rule for admission without examination is intended, or has the effect, of protecting Virginia lawyers. The uncontroverted purpose of Virginia's requirement of residence for admission to the bar without examination is to supplant the assurances of commitment to the bar and competence in local law otherwise provided by the bar examination. Residence achieves the objective of commitment to the bar because it requires the untested applicant to make a personal investment in the jurisdiction and in the Virginia legal system. Residence supports the objective of proficiency in Virginia law because it insulates the untested applicant from the demands of a former or developing out-of-state practice. There can be no doubt that these objectives, in theory and

in practice, are rationally related to Virginia's compelling interest in regulating the practice of law, and in protecting the consumers of legal services in this Commonwealth. That is all the justification the Equal Protection Clause requires. *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1971).

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CONCLUSION

For the reasons stated, neither the Commerce Clause nor the Equal Protection Clause provides an independent and sufficient ground for affirmance. The Supreme Court of Virginia and its Clerk urge the Court to reverse the judgement of the court of appeals below.

Respectfully submitted,

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